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No. 295

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933.

FLORENCE SAMUELS LANDRESS,
Petitioner,

versus

PHOENIX MUTUAL LIFE INSURANCE COMPANY
and
TRAVELERS INSURANCE COMPANY,
Respondents.

CONSOLIDATED CAUSES.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI.

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St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

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I.

THE ALLEGED GROUNDS FOR THE WRIT DO NOT EXIST.

Petitioner will be referred to as plaintiff and respondents as defendants, as they stood in the District Court.

A.

Errors in Plaintiff's Statement of the Case.

The language of the Phoenix policies in suit is misquoted in the petition (p. 2) by the omission of a vital word, "solely." The petition states the language in part thus:

> "Directly and independently of all other causes from bodily injuries effected through external, violent and accidental means."

Whereas the correct language, as set out in the declaration (R. 3), is:

> "Directly and independently of all other causes from bodily injuries effected **solely** through external, violent and accidental causes."

The Travelers policy provides for insurance **only** against loss resulting

> "from bodily injuries, effected directly and independently of all other causes, through external, violent and accidental means,"

and (under further provisions here applicable) **only** in event "such injuries • • • shall result, independently and exclusively of all other causes," in the loss in question. The petition (p. 2) ignores the word "only." All the policies were sent up on the appeal (R. 2). Plaintiff's argument on the merits and references to other decisions sup-

posedly in conflict would be more pertinent in the absence of the requirement that an external, violent and accidental means be the **"sole"** or "only" cause of the injuries. The same erroneous statement by plaintiff in her brief in the Circuit Court of Appeals was pointed out in that court.

Plaintiff fails to mention an important motion and subsequent proceedings thereon with respect to the third count of the declaration which go to the heart of her argument based on the supposed existence of an abnormal condition of the insured's body. Her petition is grounded on the third count as it stood originally in the declaration, and ignores the modification thereof which had occurred before the District Court's ruling from which the appeal was taken. In its original form this count asserted as an allegation of fact (R. 8) that insured was suffering from a "temporary and unknown condition," which (in the language of her petition, p. 18) "transformed an intentional into an unintentional act." Defendants attacked the third count by a motion to make it more specific with reference to this alleged temporary and unknown condition by specifying the nature thereof, etc. (R. 9). The motions were **sustained** and the following proceedings had thereon as set forth in the order of judgment (R. 17):

> "(b) That said motions to make the third count of the declarations more specific be and they are hereby sustained.
>
> "Thereupon plaintiff, by her counsel, **admitted and agreed that she was unable to make the third count**

> **of the declarations more specific in the matter complained of by said motions with respect thereto,** whereupon defendants' motions to amend their motions to make the declaration more specific, by moving to strike the third count, were duly allowed; and said motions to strike were, by consent of all parties, treated as demurrers to the third count, * * * and the Court, on due consideration thereof, **in connection with plaintiff's said admission,** orders that said demurrers be, and they are, hereby in all things sustained."

Note. **No exception** was taken by plaintiff to the ruling of the Court in sustaining said motions (R. 17-18), and no error was assigned with respect thereto (R. 23-24). The effect thereof was:

> (a) A conclusive adjudication that the allegations in question were insufficiently definite and specific to stand as allegations of fact.
>
> (b) A record amendment to the third count of the declaration, as result of which the issues ultimately presented for decision on the demurrer do not include the cause of action stated by that count in its original form. As met by the demurrer the cause of action stated by that count had been modified by the Court's ruling on the motion to make more specific and amended by plaintiff's admission that the allegations in question were in effect made merely as **conclusions.**

The third count, therefore, adds nothing to the cause of action alleged in the other three counts. The assertion as to the insured's "temporary condition," being thus merely

a conclusion from other facts alleged, is not admitted by the demurrer (**Crockett v. McLanahan**, 109 Tenn. 517, 525, 72 S. W. 950; **H. T. Hackney Co. v. Robt. E. Lee Hotel**, 156 Tenn. 243, 252, 300 S. W. 1). To state a cause of action it was necessary for plaintiff to allege facts affirmatively showing the death occurred from accidental causes under conditions specified in the policies. The presumption is that death occurred from natural causes (**Travelers Ins. Co. v. McConkey**, 127 U. S. 661, 32 L. Ed. 308; **Natl. Masonic Assn. v. Shyrock** [C. C. A. 8], 73 Fed. 774; **Westmoreland v. Preferred Acc. Ins. Co.** [C. C. Ga.], 75 Fed. 244). An allegation that an unknown cause co-operated with the usual effect of a known cause adds nothing to the declaration (**Westmoreland v. Preferred Acc. Ins. Co.**, supra).

B.

This Court has Recently Denied Application for Certiorari on the Same Question.

In **Nickman v. N. Y. Life Ins. Co.**, 282 U. S. 855, 75 L. Ed. 757, this Court denied a certiorari application involving a claim on the same policy provisions for death by sunstroke decided by the lower court (39 F. [2d] 763) on substantially the same grounds as here presented. As an allegedly new feature plaintiff has sought to inject the question involved in the "anaesthetic cases," discussed in the petition. The effort failed by reason of plaintiff's inability to make any factual allegations concerning the in-

sured's physical condition. But with or without this question, the petition boils down to the simple issue whether, under the authority of **U. S. Mutual Acc. Asso. v. Barry,** 131 U. S. 100, 33 L. Ed. 60, a mere unexpected and unexplained result of a voluntary act, without any intervening accident, is a result produced by an accidental cause. And that was precisely the issue in the Nickman case.

C.

There Is No Conflict in the Circuits on the Issue Here.

As the District Court observed (R. 20-21), the third count of the declaration "undertakes, by elimination, to state a cause of action" within the principles of "earlier decisions"—namely, **Mutual L. Ins. Co. v. Dodge** (C. C. A. 4), 11 F. (2d) 486, and **Aetna L. Ins. Co. v. Brand** (C. C. A. 2), 265 Fed. 6. But the effort failed because of plaintiff's inability to make the necessary factual allegations as to the supposed abnormal physical condition of the insured. The Dodge and Brand cases, therefore (assuming them properly decided), are not applicable here, for the reasons, among others, that:

(a) The physical condition in those cases was capable of affirmative proof by direct or circumstantial evidence. But here the supposed temporary supersusceptibility to heat admittedly is based on nothing in the world but the fact that he suffered a sunstroke. This momentary supersusceptibility might have been

caused by one or more of various things he had done, or other circumstances as to which plaintiff admittedly could offer no proof, and none of which could with any reasonable certainty have been inferred with more plausibility than any other one.

(b) In the instant case plaintiff was compelled to allege a temporary abnormal physical condition, i. e., temporary inability to withstand heat, in order to steer her declaration clear of the further clause in the Phoenix policies making the double indemnity nonpayable if death result

> "directly or indirectly, wholly or partly, from physical or mental infirmity * * * or from * * * disease."

(c) The physical condition in the Dodge and Brand cases was of **inherent** nature, resulting from causes over which insured had **no control**. Whereas, the "temporary condition or disorder" alleged in the instant case presumably would result only from some temporary cause over which insured might have control. Thus, the insured might have voluntarily eaten or drunk something that would produce a "temporary condition or disorder" affecting temporarily his ability to withstand intense heat, which condition might be unknown to him, but, nevertheless, since voluntarily produced, would not be accidental. When a child has its first adventure into an orchard of green apples, the resulting stomach ache is produced by a condition in his stomach of which he is ignorant, but it is not accidental.

In other words, among the ultimate features on which the Dodge and Brand cases, even if good law, would fail utterly to sustain the theory here urged are (1) that they involved affirmative evidence of a permanent abnormal physical condition unknown to the insured, while in the present case plaintiff must ask the Court to "presume" a similar temporary condition; and (2) that in those cases the physical condition in question was admittedly not caused by any voluntary act on the part of the insured, while in the present case it very easily might have been, but plaintiff seeks a "presumption" that it was not.

We challenge plaintiff's assertion (Petition, p. 8) that the Circuits "divide on whether an ordinarily harmless act is followed by an injury which, in the ordinary course of things, is not reasonably to be expected, it can, without more, be said that the injury is effected through accidental means." No Circuit Court of Appeals has announced such a doctrine. A man for exercise raises and lowers himself from a chair. The exertion causes heart failure and death. Although this "ordinarily harmless act" is followed by "an injury which, in the ordinary course of things is not reasonably to be expected," the injury is not effected through accidental means (**Hastings v. Travelers Ins. Co.** [C. C.—Wash.], 190 Fed. 258). No Circuit Court of Appeals has decided or indicated it would decide this question differently. Yet it is a perfect test case of the question on which plaintiff asserts the Circuits are in

sharp conflict. There is a theory adopted by a few state courts, known as the theory of "accidental result," as distinguished from that of "result from accidental cause." This will be discussed later, but the important point here is that no Circuit Court of Appeals, so far as we can find, has ever adopted it. Contra, the theory of result from accidental cause is not infrequently referred to as the "rule of the Federal Courts" on this subject. Thus, in holding a sunstroke not the result of an accidental cause, a District Court of Pennsylvania in **Paist v. Aetna Life Ins. Co.**, 52 F. (2d) 393, said:

> "'Though there are some irreconcilable decisions, this rule **has been generally accepted by the federal courts**, both in sunstroke cases (Nickman v. N. Y. Life Ins. Co., 39 F. [2d] 767 [C. C. A. 6]) and in other cases involving the general question of accidental means. * * *
>
> "'While I do not think that the bodily reactions which caused and constituted the injuries in this case can be said to have been a natural or probable result of the insured's exposure to the sun's rays, nevertheless the insured's voluntary act was not complicated by any unforeseen, unexpected or unusual occurrence. I therefore conclude that the means effecting the injuries which resulted in the insured's death in this case were not accidental.
>
> "'I am also of the opinion that there is no evidence in this case of a visible contusion or wound upon the exterior of the body. To hold that a flushed, sunburned face is a wound or contusion would be

straining language far beyond any reasonable meaning which could be assigned to it.'?"

(Note: All bold face type ours unless otherwise indicated.)

Above case was affirmed in 60 F. (2d) 476. The Appellate Court elected to rest its decision on the second ground stated by the District Judge, namely, that death from sun stroke was not "evidenced by a visible contusion or wound" within the double indemnity clause. It therefore refrained from passing on the first question.

In **Jensma v. Sun Life Ins. Co.** (C. C. A. 9), 64 F. (2d) 457, relied on by plaintiff, there was an accidental entry of germs **from the outside**, and this was the cause of the bodily injuries which produced death. As the Court said (p. 459), all the evidence pointed **"inescapably to infection from some external means,"** and also a witness heavily relied upon had declared (p. 459), "It was probably introduced from the outside, probably after the infection." Of course, as the opinion concedes (p. 459), if the infection or unknown cause had "come from within the decedent's own body" there could have been no recovery. That case is no authority for the proposition that mere existence of temporary inability of the insured to withstand sun heat is an external, violent or accidental means. The same is true of **Lewis v. Ocean Acc. & G. Corp.**, 224 N. Y. 18, next referred to by plaintiff. There also a germ, the staphylococcus aureus, was accidentally introduced from the outside

into the insured's body. In both of these cases there was actual evidence of an accidental external infection. As stated in the latter (p. 29):

> "The plaintiff's experts say that in their opinion the entrance of the germs from the skin into the deeper tissues was the result of trauma. They say that trauma is almost invariably the cause of such infections. We find the signs of trauma here in the punctured wound which was visible when the physician was first consulted. The insured was an athlete in the prime of life and the fullness of health; **the infection was not due, therefore, to lowered powers of resistance.**"

Whereas, the instant case in this connection is based directly and solely on the insured's alleged temporary "lowered power of resistance" to the heat of the sun.

Of the other cases cited by plaintiff, **Maryland Cas. Co. v. Spitz** (C. C. A. 3), 246 Fed. 817, held the injury in question was not produced by accidental means, and denied recovery. It therefore could not constitute an adverse authority on the point in question. Contra, the law of the Third Circuit is well established to the effect that the mere unexpectedness of a result does not constitute it a result produced by accidental means. Thus, the insured stubbed his toe, which, due to unknown defective condition of his body, was followed by gangrene and in turn by death. Held, there could be no recovery under an accident policy against "bodily injuries effected solely through external,

violent and accidental means, that independently of all other causes result in death or disabilities set forth" (**Maryland Casualty Co. v. Morrow** [C. C. A. 3], 213 Fed. 599). The authority of this case in the Third Circuit has never been questioned.

State L. Ins. Co. v. Allison (C. C. A. 5), 269 Fed. 93, cited by plaintiff, is pertinent neither to the instant case nor to the supposed conflict in the circuits. It involved an admitted external injury which resulted in death, and the question was whether the cause producing such injury was accidental. This cause consisted in the unexpected striking of the insured's head by a piece of shrapnel. The Court held that in view of the small number of persons struck by missiles in comparison with the number engaged in the battle, the striking of any one of them should be regarded as accidental. The point wherein that case differs from the one at bar is that there the striking of insured by the shrapnel was involuntary on his part, and was an act which (the Court thought) he was reasonably entitled to assume probably would not occur, whereas in the instant case the "striking of the sun's rays" on the insured (which plaintiff argues was the necessary bodily injury) was the expected result of the insured's voluntary exposure of himself to the rays of the sun. Stated otherwise, in the instant case the insured knew he would be struck by the sun's rays, whereas in the Allison case it was fair to assume that, while he might be, the chances were

he would not be struck by the missile. In battle many are shot at, comparatively few are hit.

Concluding this subject, we submit the Circuit Courts of Appeal are not in conflict on the question—decisive of plaintiff's case—whether the cause or means, as distinguished from the result, must be accidental.

II.

THE CASE WAS CORRECTLY DECIDED BY THE LOWER COURTS.

A.

There Was No Accidental Cause.

Plaintiff's argument on the merits is based on an analysis of **U. S. Mutual Acc. Asso. v. Barry**, supra, which is devoted to an effort to eliminate from the decision the very point on which it actually turned, namely, the slip or mishap occurring in the course of insured's act of jumping. Thus, in concluding the analysis the petition states (p. 16):

> "As we have seen, there was no affirmative evidence that insured did not land exactly as he intended, or of anything that happened between the act of jumping and the landing."

Contrast this with the Court's charge to the jury (p. 109):

> "'here is the precise point on which the question

turns: Was there or not any unexpected or unforeseen or involuntary **movement of the body** from the time Dr. Barry left the platform until he reached the ground, or in the act of alighting? Did he or not alight on the ground just as he intended to do? Did he accomplish just what he intended to, in the way he intended to? Did he or not unexpectedly lose or relax his self-control in his downward movement? Did his feet strike the ground as he intended or expected, or did they not? Did he or not miscalculate the distance, and was there or not any **involuntary turning of the body** in the downward movement, or in the act of alighting on the ground? These are points directly pertinent to the question in hand.

"'And I instruct you that if Dr. Barry jumped from the platform and alighted on the ground in the way he intended to do, and nothing unforeseen, unexpected or involuntary occurred, changing or affecting the downward movement of his body as he expected or would naturally expect such a movement to be made, or causing him to strike the ground in any different way or position from that which he anticipated, or would naturally anticipate, then any resulting injury was not effected through any accidental means. (But if, in jumping or alighting on the ground, there occurred, from any cause, any unforeseen or **involuntary movement**, turn or strain of the body which brought about the alleged injury, or if there occurred any unforeseen circumstance which interfered with or changed such a downward movement as he expected to make or as it would be natural to expect under such circumstances, and as caused him to alight on the ground in a different position or way from that which he intended or ex-

pected, and injury thereby resulted, then the injury would be attributable to accidental means.)' "

The trial court thus charged (and this Court approved) that the question was not whether the result was unexpected, but whether there was something unexpected in the **cause**, i. e., the manner of the jump.

The decision, we submit, was correctly analyzed in **Pope v. Prudential Ins. Co. of America** (C. C. A. 6), 29 F. (2d) 544, wherein Judge Denison said (p. 186):

> "In U. S. Mutual Ass'n v. Barry, 131 U. S. 100-121, 9 S. Ct. 755, 33 L. Ed. 60, the Court had to consider whether there was evidence to support a finding that the injury had been caused by accidental means, and to review the definitions given by the trial court. The evidence recited, what the Court had said in its charge to the jury, and the comments of the Supreme Court, all indicate that the approved theory of recovery was that there had been some slip or mishap attending Barry's act in jumping to the ground, whereby his intended act was, as to the manner of its execution; transformed into an unintended one. To make the case parallel to the present one, it would have to be assumed that the surgeon in this case, in bringing the kidney up to an accessible point, **had some slip or mishap, and exerted the lifting force with some sudden jerk which was accidental.**"

Plaintiff's brief in the Circuit Court of Appeals approved the interpretation which the Pope case placed on

the Barry case, and asserted it was in accord with "practically all reported cases from other circuits in which recoveries have either been allowed or denied."

In **Caldwell v. Travelers Ins. Co.**, 305 Mo. 619, 267 S. W. 907, 39 A. L. R. 56, after considering at length the Barry case, the opinion proceeds (pp. 72-73):

> "I am unable to understand how the language used in the instruction to the jury, given by the trial court and approved by the Supreme Court of the United States, can be construed as lending any support to the doctrine that, where the injury is the unexpected result of an intentional act, it is caused by accidental means."
>
> • • • •
>
> (pp. 79-80) "As above indicated, the rule that injury or death is produced by accidental means when the **result** is unusual, unexpected, or unforeseen seems largely to be built upon a **misconception** of the case of United States Mut. Acci. Asso. v. Barry, 131 U. S. 100, 33 L. Ed. 60, 9 Sup. Ct. Rep. 755, above discussed. That case clearly lays down the rule contended for by defendant in the case at bar. In discussing 'accidental means' Mr. Justice Blatchford most correctly said that the jumping off the platform was the means causing the injury, and that the question submitted to the jury was whether there occurred anything accidental, unforeseen, involuntary or unexpected in such act of jumping—that is, in the means which produced the injury—from the time deceased left the platform until he alighted upon the ground. That which occurred when Dr. Barry alighted upon the

ground was clearly the result. **It was not enough that the result was unexpected, unforeseen or out of the ordinary.** The learned Justice then laid down the proposition, which seems to me is decisive of this case and fully sustains defendant's contention here, 'that, if a result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, it cannot be called a result effected by accidental means; but that if, in the act which precedes the injury, something unforeseen, unexpected, unusual, occurs, which produces the injury, then the injury has resulted through accidental means.' Could language be plainer? The words 'in a not unusual or unexpected way' plainly modified the verb 'employed,' and not the preceding verb 'follows.' If the language could possibly be made plainer it would be by saying that, where the means which causes the injury was voluntarily employed in the usual and expected way, the resulting injury is not produced by accidental means, even though such resulting injury is entirely unusual, unexpected and unforeseen."

From plaintiff's statement of the Barry case (Petition, pp. 14, 15) it would appear the controlling questions were whether the manner of landing "was one from which injury was reasonably to be expected," and whether the insured "was ignorant of the danger," or "ignorant of the proper way to land." The opinion makes no reference to any such questions. The issue submitted to the jury (and approved by this Court) was whether some unintentional slip, twist or turn caused the insured to alight,

from a physical standpoint, otherwise than as he intended. As the trial court said (p. 110): "Of course, it is to be presumed that he expected to reach the ground safely." There was no question for the jury as to that. The question submitted was as to an unexpected physical act, a slip, twist or turn; not as to a mental conception as to safety or danger from alighting in the manner he intended. Contrary to the implication in the petition (p. 15) there is absolutely no reference in the case to any presumption regarding the insured's "knowledge or ignorance of the proper way to land." Both the trial and appellate courts in effect stated that, regardless of assured's knowledge of the effect of alighting in any particular manner, there was no accident in the jump if he landed physically as he intended to. The petition asserts (p. 15):

> "There was no ground upon which a verdict could rest unless the jury was at liberty to say that either (1) he did not intend to land as he did or (2) he did so intend, but was ignorant of the danger."

Aside from reasons just indicated this is erroneous, because:

(a) The jury was instructed to consider the ultimate issue "in the light of all proven facts" (p. 108).

(b) An approved instruction was that "The jumping off the platform was the **means** by which the injury, if

any, was caused" (p. 109). This necessarily negatived any inference that such means could consist in the insured's intention, knowledge or ignorance.

(c) Another approved instruction was that:

> "Now, to simplify the question and apply to its consideration a common-sense rule, did anything, by chance or not as expected, happen, in the **act of jumping or striking the ground**, which caused an accident? This, I think, is the test by which you should be governed in determining whether the alleged injury, if any was sustained, was or was not effected through accidental means" (p. 110).

(d) There was no testimony as to whether he "was ignorant of the danger." The complaint (pp. 101-102) contained no allegation or predicate for such testimony.

This brings us to the epitome of plaintiff's argument as founded on the Barry case (Petition, p. 17):

> "The error in the decision below is that it is based entirely on the rule that if an injury follows intentional act without some intervening accident or involuntary act it is not effected by accidental means, but ignores what we think was expressly decided in the Barry case, that there is ample evidence of such intervention when the injury is one which could not be reasonably expected from the intentional act."

The Barry case held that the jury could find an accident in the jump, not as a legal presumption from the

mere fact that the insured's duodenum was ruptured (i. e., the "accidental result"), without further explanation, but as an inference of fact from the physical manner of landing. Whereas, in the case at bar there was no factual showing as to the "intervening accident or involuntary act," but merely the showing of the unexpected result, from which plaintiff seeks a legal presumption that there was "such intervention." Plaintiff's contention by implication concedes there must be an "intervening accident" and that she cannot rest alone on a mere unexpected result, but urges the necessary intervening accident may be "presumed," without more, from the unexpected result. Plaintiff reasons as follows:

(a) The very occurrence of an unexplained injury raises a **presumption** that there was some slip, mishap or ignorance of a material factor.

(b) Therefore, the very occurrence of an unexplained injury raises a presumption that transforms the intentional act into an accidental cause.

(c) Therefore, the very occurrence of an unexpected and unexplained injury raises a presumption that it resulted from an accidental cause.

Thus, by the injection of the "presumption," plaintiff arrives at a conclusion that is in direct conflict with the correct theory of result from accidental cause. In effect, she proves that an "accidental result" is the result of an

accidental cause because there is a presumption that it is. This is what plaintiff in her petition (p. 17) refers to as

> "the very fair presumption that * * * when he (the insured) does what he did and others are accustomed to do without injury, he intends and expects to do it in safety, and that the unintended and unexpected injury is brought about by chance or mishap, or * * * by ignorance of an existing circumstance or condition," etc.

B.

The Supposed Accidental Cause (Inability to Withstand Heat) Was Neither External Nor Violent.

The policies provide there shall be no liability unless the death resulted directly and independently of all other causes from bodily injuries effected solely through external, violent and accidental causes. The **external** causes were the insured's voluntarily subjecting himself to the heat of the sun and his physical exertions incident to playing golf under external circumstances known to him. Nothing was done or occurred, except his resulting illness and death, that was not planned and foreseen by him. While doing exactly what he intended to do, in the exact manner in which he intended to do it, he simply exposed himself to the heat longer than his body could endure. But such exposure and exertion were not, either as to their duration or intensity, or otherwise, caused by any

mishap or unexpected event. While we may assume these were "violent" they were not accidental. And, on the other hand, the alleged **internal** cause, the insured's "temporary condition," sought to be inferred from the mere happening of the death, **was neither external nor violent.**

As stated by the Circuit Court of Appeals herein (R. 30):

> "Finally, if we could construe the third counts of the declarations as averring that the hypersusceptibility of the insured's body to excessive temperature was the accidental cause of his death, we are still confronted with the proposition that such was not the independent cause of death or independent means through which it was effected (Hesse v. Travelers Ins. Co., 299 Pa. 125, 129, 149 A. 96). Nor was it a violent and external cause or means in the sense of the indemnity provisions of the policies. (See Order of United Commercial Travelers v. Shane, supra.)"

And in this connection we beg to refer to the opinion of Judge Taylor in the District Court (R. 22):

> "If as to the third count of the declaration it may be said that there was existing within the insured's body and unknown to him some disorder or condition short of mental or physical infirmity which caused the rays of the sun or the applied heat to produce a different result from that in the case of others, under otherwise identical conditions, such condition was not accidental because unknown. It was a means, in that view, neither accidental, external nor violent. The

Barry case has no such import. The means or cause leading to the result determine the question of liability. That the result was unexpected, unusual or unintended creates no basis for conclusion that a means or cause thereof was accidental, even if unknown. Hypersusceptibility, or more than usual sensitiveness to an external application of force, is not accidental means."

In **Order etc. v. Shane** (C. C. A. 8), 64 F. (2d) 55, the Court, after declaring that the idiosyncrasy of the insured with respect to butyn, administration of which caused his death, was not an "accidental means," proceeded (p. 59):

"Furthermore, in such case the idiosyncrasy would not be either a violent or an external means."

The point is well stated in **Hesse v. Travelers Ins. Co.**, 299 Pa. 125, 149 Atl. 96, wherein the insured died in an operation because of his hypersusceptibility to the anaesthetic. After pointing out that the operation was performed just as intended, the Court said (p. 97):

"Even if we assume that the operation was a bodily injury within the meaning of the policy, we have it admitted that the insured's death did not result from the operation, but solely from the anaesthetic, neither the administration nor the effect of which could possibly be * * * a bodily injury 'through * * * accidental **means.**' There were no accidental means; all those employed were inten-

tional. Nor, if appellant could escape this fact, would she be greatly helped, for decedent's 'bodily injuries (were not) effected directly and **independently** of all other causes' through such means. On the contrary, admittedly the effective cause was his hypersusceptibility to the particular anaesthetic. Defendant did not insure against a loss resulting from such a cause; yet admittedly it was at least a contributing cause of the death, which did not result **'independently'** of it, and this alone is sufficient to exclude liability under the policy." (Emphasis the Court's.)

Similarly, in **Seipel v. Equitable Life Ins. Co. of Iowa** (C. C. A. 7), 59 F. (2d) 544, the insured, an experienced mechanic, and another were lifting in place a truck wheel when insured sustained an umbilical hernia from which he died. In the language of the present plaintiff's declarations and arguments, the act there intentionally performed, as shown in the opinion, was "not one which often results in injury," and "it appears that it is an act which insured and others were accustomed to perform without injury, and which others did perform in safety at the same time and place." But instead of **presuming** "the intervention of either an involuntary act or some unknown circumstance or condition," the Court declared (p. 545):

"If the means which alone caused the hernia were means which Seipel himself intentionally invoked and employed, then the means were not accidental,

> **however unintended and unexpected the result.** In other words, if Seipel intentionally participated in lifting this wheel into position, and while so lifting or holding it the hernia occurred, without the intervention of **outside** and accidental means causing it, his injury was not caused in such manner as to raise liability for the double indemnity (citing cases). * * *
>
> "That he had never before sustained a hernia, **although frequently doing such work**, does not tend to raise any inference against its occurrence this time without the interposition of external, violent and accidental means. We are of opinion that the evidence falls short of **sustaining appellant's burden** of showing that means other than those which deceased intentionally employed were the efficient cause of his injury."

A concise analysis of the policy provisions in issue is found in **Lincoln Nat. L. Ins. Co. v. Erickson** (C. C. A. 8), 42 F. (2d) 997, 1000:

> "An analysis of the provision above quoted from the policy shows that it covers a death caused by bodily injury. The bodily injury must be one effected in a particular way, namely, directly through external means, and directly through violent means, and directly through accidental means. The bodily injury must be the exclusive cause of death independently of all other causes."

That the internal condition of the insured cannot constitute nor contribute to the "violent" or "external" cause

is illustrated in **Smith v. Travelers Ins. Co.**, 219 Mass. 147, 106 N. E. 607, L. R. A. 1916 B 872, holding a similar policy provision did not cover death from meningitis resulting from a violent snuffing of a nasal douche which caused an infection to pass from the outer nose into the brain through a hole in the mastoid bone. The "unusual condition" there present is thus indicated in the opinion:

> "That there should be a hole or perforation in the mastoid bone through which pus or germs could pass from the ear into the brain is a very rare occurrence, in only one out of about 1,000 skulls."

The Court said:

> "But there was nothing accidental in the inhalation of this douche. The deceased did exactly what he intended to do. This particular act of inhalation, though harder or more violent than usual, was not, so far as appears, harder or more violent than he intended it to be. There was no shock or surprise during the inhalation which made him draw a deeper breath than he intended to draw, nothing strange or unusual about the circumstances. The external act was exactly what he designed it to be, though it produced some **internal** consequences which he had not foreseen. Accordingly there was no bodily injury effected **through a means which was both external and accidental.** But it is only for a death resulting from injury effected through such means that the defendant is made responsible by the policy. It is not sufficient that the death or the illness that caused the death may have

been an accidental result of the external cause, but that cause itself must have been, **not only external and violent, but also accidental.**"

This is the law in Tennessee, where the insured lived, and these policies were delivered. In **Stone v. Fid. & Cas. Co.**, 133 Tenn. 672, 182 S. W. 252, L. R. A. 1916 536, plaintiff reached above his head to get a newspaper, causing a blood rupture to the retina of the eye, due to the effect of a purgative he had taken. Sustaining a demurrer to his declaration on an accident policy, the Court said (pp. 678-679):

"The weakened condition due to the purgative was not accidental, nor was the excessive blood pressure, both being physical conditions produced from natural causes. The movement of the hand suddenly to get the paper was executed exactly as intended. It was a simple and ordinary movement. The rushing of the blood with excessive pressure, rupturing the retina, was therefore caused by natural means. While the result was not foreseen, the causes producing that result were not accidental."

Pages 675-676:

"**A person may do certain acts, the result of which produces unforeseen consequences, resulting** in what is termed an **accident**; yet it does not come within the terms of this contract. The policy does not insure against an injury that may be caused by a voluntary, natural, ordinary movement, executed exactly as was intended.

> "Therefore, to determine the matter, we look, not to the result merely, but to the means producing the result. **It is not sufficient that the injury be unusual and unexpected**, but the cause itself must have been unexpected and accidental."

To the same effect is **Ramsey v. Fid. & Cas. Co.**, 143 Tenn. 42, 223 S. W. 341, denying recovery for death unexpectedly resulting from the pulling of a tooth. The temporary weakened condition of the insured in the Stone case, supra, was precisely the sort of "temporary abnormal condition" which plaintiff herein sought to set up in the third count of the declaration. And that case holds such a condition **within** the insured is not an "intervening accident" which (as plaintiff contends) transforms his voluntary act into an involuntary one. In fact, there is not one man in a thousand who has not some "abnormal condition" within his body which may yield an unexpected result to his intentional physical actions. The insuring clauses in question do not purport to insure against abnormal physical condition, chronic or temporary, of the insured, nor against his ignorance of such physical condition. If he desires such coverage he should procure insurance against disability or death from disease. If a man walking up the street collapses from heart failure, while it is a most unexpected consequence of his walk, there is nothing accidental about the cause of it that is external or violent.

C.

The Sunstroke Cases.

(1) **No accident where exposure voluntary.**

In so far as the rays of the sun are regarded as the cause of the injury or death, the obvious answer is that the insured, with full knowledge of their presence, voluntarily subjected himself to their effect. As said in the Nickman case, supra (38 F. [2d] 764-765):

> "Nothing occurred at any time to cause the insured to be involuntarily exposed. He went exactly when, where and as he intended to go throughout the day. He did just as he intended to do. He was exposed by no mishap or misadventure, as in Elsey v. Fid. & Cas. Co. * * * Here nothing affected the insured's power to will, to choose, or to direct his movements. There was nothing accidental in walking the streets, standing near the hot kettle, climbing the ladder or standing upon the roof. These were all intentional acts. He did not, of course, intend to be stricken, and his death was therefore unexpected, but it was not caused by accidental means."

In **Elsey v. Fid. & Cas. Co.**, 187 Ind. 447, L. R. A. 1918 F 646, and several others referred to in above opinion, the Court points out that the exposure itself was involuntary, which distinguishes them from the case at bar. In the cases distinguished the exposure was accidental, while in the case at bar the exposure was intentional. The correct

rule, as expounded and applied in the Nickman case, may be stated thus:

A sunstroke can be considered to be effected by accidental means only where it appears that some accidental event has occurred, and, as a result thereof, the insured been exposed to the heat in a way not intended.

In addition to **Paist v. Aetna Life Ins. Co.**, supra, the following, among others, specifically hold that death by sunstroke from voluntary exposure is not caused by accidental means:

Harloe v. California State Life Ins. Co., ... Cal. ..., 273 Pac. 560;
Semancik v. Continental Casualty Co., 56 Pa. Super. Ct. 392;
Continental Casualty Co. v. Pittman, 145 Ga. 641.

(2) **Is sunstroke a boldily injury as distinguished from a disease?**

We have assumed for argument that sunstroke is a bodily injury; but do not concede this. The demurrers urge that in no event could there be recovery herein for the reason that the effect on the insured's body produced by the excessive heat, popularly called "sunstroke," is not a "bodily injury," but is a disease. The trial court in the Nickman case based its decision on this ground. The Circuit Court of Appeals said (p. 764):

"There is much controversy over whether sunstroke is a disease, or is to be classed as a bodily injury. • • • We do not deem it necessary to decide that point."

In the case at bar the District Court, while considering the weight of authority against defendants on the point, likewise did not deem it necessary to decide it (R. 20). The Circuit Court of Appeals ignored it. For a discussion of this subject we beg to quote from a paper by Mr. Neil P. Beall of Cleveland, Ohio (Proceedings, International Claims Association, Twentieth Annual Convention, p. 73):

"Putting aside the technical definitions of the medical literature and resorting to the general encyclopedias, we find:

" '**Sunstroke** (Heat Stroke; Insolation; Thermic Fever; Siriasis), a term applied to the effects produced upon the ventral nervous system, and through it upon the other organs of the body, by exposure to the sun or to overheated air. Although most frequently observed in tropical regions, this disease occurs also in temperate climates in hot weather.'

Encyclopedia Britannica (11th Ed.), Vol. 26. page 110.

" '**Sunstroke**, prostration due to exposure to intense external heat. Such exposure may be to a direct or indirect rays of a tropical sun or to the excessive heat of an engine room. In either case heat and physical exertion combine to bring about the results. A high degree of humidity of the atmosphere

is one of the most important features, since this hinders free evaporation of fluid from the body, which is one of the most important devices for cooling the body. Sunstroke is an old disease. Osler mentions that two instances are on record in the Bible and many of the ancients described it very well, confounding the severer forms with apoplexy.'

The Americana, Vol. 26, page 38.

" '**Sunstroke**, or Thermic Fever, and fever due to the effect of excessive heat or of exposure to the direct heat of the sun, on the nervous centers at the base of the brain.'

Appleton's New Practical Cyclopedia, Vol. 6, page 123.

" '**Sunstroke**, a term applied to two different ailments resulting from the overheating of the body; heat stroke or heat fever and heat exhaustion or heat prostration.'

The American Educator, Vol. 7, page 3473.

" '**Sunstroke.** This term has been applied to two different ailments resulting from overheating of the body.'

The World Book, Vol. 9, page 5630.

"The leading case judicially determined that sunstroke is a disease is an English case, **Sinclair v. Maritime Passenger Assurance Company**, 3 El. & El. 478, decided in 1861. In that case the insured was the master of a vessel and died from sunstroke on the southwestern coast of India. He was insured against

injury from, or by reason of, or in consequence of any accident. The Court denied recovery. The Court said:

" 'Disease or death engendered by exposure to heat, cold, damp, the vicissitudes of climate, or atmospheric influences, cannot, we think, properly be said to be accidental; unless, at all events, the exposure is itself brought about by circumstances which may give it the character of accident. Thus (by way of illustration), if, from the effects of ordinary exposure to the elements, such as is common in the course of navigation, a mariner should catch cold and die, such death would not be accidental; although, if being obliged by shipwreck or other disasters to quit the ship and take to the sea in an open boat, he remained exposed to wet and cold for some time, and death ensued therefrom, the death might properly be held to be the result of accident. It is true that, in one sense, disease or death through the direct effect of a known natural cause, such as we have referred to, may be said to be accidental, inasmuch as it is uncertain beforehand whether the effect will ensue in any particular case. Exposed to the same malaria or infection, one man escapes, another succumbs. Yet diseases thus arising have always been considered, not as accidental, but as proceeding from natural causes.

" 'In the present instance, the disease called sunstroke, although the name would at first seem to imply something of external violence, is, so far as we are informed, an inflammatory disease of the brain, brought on by exposure to the too intense heat of the sun's rays. It is a disease to which persons exposing themselves to the sun in a tropical climate are more or less

liable, just as persons exposed to the other natural causes to which we have referred are liable to disastrous consequences therefrom. The deceased in the discharge of his ordinary duties about his ship became thus affected, and so died.

" 'We think, for the reasons we have given, that his death must be considered as having arisen from a "natural cause," and not from "accident" within the meaning of this policy. There must be judgment for the defendants.'

"The question has been presented to the federal courts in the case of **Dozier v. Fidelity & Casualty Company**, 46 Fed. 446, decided by the Circuit Court of Missouri in 1891. The headnote of that case is as follows:

" 'Sunstroke or heat prostration' contracted by the decedent in the course of his ordinary duty as a supervising architect, is a disease, and does not come within the terms of a policy of insurance against bodily injuries, sustained through external, violent and accidental means, but expressly excepting 'any disease or bodily infirmity.'

"On page 448 the Court properly says:

" 'With what propriety for accuracy, therefore, can this malady be termed an accident, any more than cholera, smallpox or yellow fever, or apoplexy? It may be an accident that a person is exposed to it, but the conditions under which the human system may be affected by it, certainly belong to natural causes, which may reasonably be anticipated, as they come not by chance.'

"The following quotations show that other federal courts regard sunstroke as a disease:

"'If death was caused by a disease, without any bodily injury inflicted by external, violent and accidental means, as in the case of malignant pustule (Bacon v. Assn., 123 N. Y. 304) and as in the case of sunstroke (Sinclair v. Assurance Company, 3 L. & El. 478; Dozier v. Casualty Company, 46 Fed. 448), the association was free from liability by the express terms of the certificate.'

"**Western Commercial Travelers Assn. v. Smith**, 85 Fed. 401, 404.

"'This leaves only hydrophobia and sunstroke to be accounted for, which it must be confessed are diseases pure and simple, and as to which the point may therefore seem to be well made.' **Herdic v. Maryland Casualty Company**, 146 Fed. 396-8, affirmed 149 Fed. 198.

"The weight of reasoning, therefore, if not the weight of authority, indicates that sunstroke is a disease and not a bodily injury."

These authorities establish that as a legal proposition sunstroke is a disease in the nature of a brain fever produced by exposure to excessive heat, in the same sense that pneumonia is a disease engendered by exposure to cold, and in the same sense that many other maladies and ills to which human flesh is heir, occasioned more or less directly by exposure to the vicissitudes of climate or atmosphere, are diseases. The anatomical lesions brought about by exposure to excessive heat are pathological rather than traumatic. There is no element of bodily injury.

In which case, under the language of these policies, the insurance does not apply.

For the reasons hereinabove set forth we believe the petition should be denied.

Respectfuly submitted,

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